

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Feb 03, 2022

SEAN F. MCAVOY, CLERK

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

LAURIE D.,¹

Plaintiff,

vs.

KILOLO KIJAKAZI, ACTING
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:20-cv-03237-MKD

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 13, 14

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 13, 14. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court grants Plaintiff's motion, ECF No. 13, and denies Defendant's motion, ECF No. 14.

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

JURISDICTION

The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3).

STANDARD OF REVIEW

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674

1 F.3d 1104, 1111 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. §§
2 404.1502(a), 416.920(a). Further, a district court “may not reverse an ALJ’s
3 decision on account of an error that is harmless.” *Id.* An error is harmless “where
4 it is inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at
5 1115 (quotation and citation omitted). The party appealing the ALJ’s decision
6 generally bears the burden of establishing that it was harmed. *Shinseki v. Sanders*,
7 556 U.S. 396, 409-10 (2009).

8 **FIVE-STEP EVALUATION PROCESS**

9 A claimant must satisfy two conditions to be considered “disabled” within
10 the meaning of the Social Security Act. First, the claimant must be “unable to
11 engage in any substantial gainful activity by reason of any medically determinable
12 physical or mental impairment which can be expected to result in death or which
13 has lasted or can be expected to last for a continuous period of not less than twelve
14 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
15 impairment must be “of such severity that he is not only unable to do his previous
16 work[,] but cannot, considering his age, education, and work experience, engage in
17 any other kind of substantial gainful work which exists in the national economy.”
18 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

19 The Commissioner has established a five-step sequential analysis to
20 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§

1 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
2 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
3 416.920(a)(4)(i). If the claimant is engaged in "substantial gainful activity," the
4 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
5 404.1520(b), 416.920(b).

6 If the claimant is not engaged in substantial gainful activity, the analysis
7 proceeds to step two. At this step, the Commissioner considers the severity of the
8 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
9 claimant suffers from "any impairment or combination of impairments which
10 significantly limits [his or her] physical or mental ability to do basic work
11 activities," the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
12 416.920(c). If the claimant's impairment does not satisfy this severity threshold,
13 however, the Commissioner must find that the claimant is not disabled. *Id.*

14 At step three, the Commissioner compares the claimant's impairment to
15 severe impairments recognized by the Commissioner to be so severe as to preclude
16 a person from engaging in substantial gainful activity. 20 C.F.R. §§
17 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
18 severe than one of the enumerated impairments, the Commissioner must find the
19 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

1 If the severity of the claimant's impairment does not meet or exceed the
2 severity of the enumerated impairments, the Commissioner must pause to assess
3 the claimant's "residual functional capacity." Residual functional capacity (RFC),
4 defined generally as the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
6 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
7 analysis.

8 At step four, the Commissioner considers whether, in view of the claimant's
9 RFC, the claimant is capable of performing work that he or she has performed in
10 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
11 If the claimant is capable of performing past relevant work, the Commissioner
12 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).
13 If the claimant is incapable of performing such work, the analysis proceeds to step
14 five.

15 At step five, the Commissioner considers whether, in view of the claimant's
16 RFC, the claimant is capable of performing other work in the national economy.
17 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
18 the Commissioner must also consider vocational factors such as the claimant's age,
19 education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
20 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the

1 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
2 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
3 work, analysis concludes with a finding that the claimant is disabled and is
4 therefore entitled to benefits. *Id.*

5 The claimant bears the burden of proof at steps one through four above.
6 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
7 step five, the burden shifts to the Commissioner to establish that 1) the claimant is
8 capable of performing other work; and 2) such work “exists in significant numbers
9 in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v.*
10 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

11 **ALJ’S FINDINGS**

12 On July 7, 2014, Plaintiff applied for Title XVI supplemental security
13 income benefits, and on July 25, 2014, Plaintiff applied for Title II disability
14 insurance benefits; in both applications, Plaintiff alleged a disability onset date of
15 November 30, 2010. Tr. 50-51, 209-14, 701. The applications were denied
16 initially and on reconsideration. Tr. 108-40. Plaintiff appeared before an
17 administrative law judge (ALJ) on July 19, 2016. Tr. 18-49. On August 31, 2016,
18 the ALJ denied Plaintiff’s claim. Tr. 674-97. Plaintiff appealed the denial to the
19 Appeals Council and then this Court, which resulted in a remand. Tr. 799-830.

1 Plaintiff appeared for a remand hearing on August 12, 2020. Tr. 741-67. On
2 August 24, 2020, the ALJ again denied Plaintiff's claim. Tr. 698-721.

3 At step one of the sequential evaluation process, the ALJ found Plaintiff,
4 who met the insured status requirements through December 31, 2013, has not
5 engaged in substantial gainful activity since November 30, 2010. Tr. 704. At step
6 two, the ALJ found that Plaintiff has the following severe impairments: cervical
7 and lumbar spinal impairment(s), bilateral shoulder impairment(s), obesity, mood
8 disorder(s), anxiety disorder(s), and substance use disorder(s). *Id.*

9 At step three, the ALJ found Plaintiff does not have an impairment or
10 combination of impairments that meets or medically equals the severity of a listed
11 impairment. *Id.* The ALJ then concluded that Plaintiff has the RFC to perform
12 light work with the following limitations:

13 [Plaintiff] can occasionally crawl and climb ladders, rope, and
14 scaffolding. She can occasional[ly] reach overhead bilaterally. She
15 should avoid concentrated exposure to vibration, extreme cold, or
16 hazards. She can understand, remember and carry out simple
17 instructions. She can exercise simple workplace judgment and can
18 perform work that is learned on the job in less than thirty days by
short demonstration and practice or repetition. She can have
occasional superficial interaction with coworkers. She can work in
jobs that require only superficial interaction or contact with the
general public. She can deal with occasional changes in the work
environment.

19 Tr. 706-07.
20

At step four, the ALJ found Plaintiff has no past relevant work. Tr. 714. At step five, the ALJ found that, considering Plaintiff's age, education, work experience, RFC, and testimony from the vocational expert, there were jobs that existed in significant numbers in the national economy that Plaintiff could perform, such as small parts assembler, collator operator, and housekeeper cleaner. Tr. 715. Therefore, the ALJ concluded Plaintiff was not under a disability, as defined in the Social Security Act, from the alleged onset date of November 30, 2010, through the date of the decision. *Id.*

Per 20 C.F.R. §§ 404.984, 416.1484 the ALJ's decision following this Court's prior remand became the Commissioner's final decision for purposes of judicial review.

ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying her disability insurance benefits under Title II and supplemental security income benefits under Title XVI of the Social Security Act. Plaintiff raises the following issues for review:

1. Whether the ALJ properly evaluated Plaintiff's symptom claims;
2. Whether the ALJ conducted a proper step-three analysis; and
3. Whether the ALJ properly evaluated the medical opinion evidence.

ECF No. 13 at 2.

DISCUSSION

A. Plaintiff's Symptom Claims

Plaintiff faults the ALJ for failing to rely on reasons that were clear and convincing in discrediting her symptom claims. ECF No. 13 at 16-21. An ALJ engages in a two-step analysis to determine whether to discount a claimant's testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2. "First, the ALJ must determine whether there is objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).

"The claimant is not required to show that [the claimant's] impairment could reasonably be expected to cause the severity of the symptom [the claimant] has alleged; [the claimant] need only show that it could reasonably have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

Second, "[i]f the claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the claimant's testimony about the severity of the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations omitted). General findings are insufficient; rather, the ALJ must identify what symptom claims are being discounted and what evidence undermines these claims. *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995)); *Thomas v.*

1 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently
2 explain why it discounted claimant’s symptom claims)). “The clear and
3 convincing [evidence] standard is the most demanding required in Social Security
4 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
5 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

6 Factors to be considered in evaluating the intensity, persistence, and limiting
7 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
8 duration, frequency, and intensity of pain or other symptoms; 3) factors that
9 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
10 side effects of any medication an individual takes or has taken to alleviate pain or
11 other symptoms; 5) treatment, other than medication, an individual receives or has
12 received for relief of pain or other symptoms; 6) any measures other than treatment
13 an individual uses or has used to relieve pain or other symptoms; and 7) any other
14 factors concerning an individual’s functional limitations and restrictions due to
15 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §§
16 404.1529(c), 416.929(c). The ALJ is instructed to “consider all of the evidence in
17 an individual’s record,” to “determine how symptoms limit ability to perform
18 work-related activities.” SSR 16-3p, 2016 WL 1119029, at *2.

19 The ALJ found that Plaintiff’s medically determinable impairments could
20 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff’s

1 statements concerning the intensity, persistence, and limiting effects of her
2 symptoms were not entirely consistent with the evidence. Tr. 708.

3 *1. Lack of Treatment*

4 The ALJ found Plaintiff's symptom claims were inconsistent with her lack
5 of treatment. *Id.* An unexplained, or inadequately explained, failure to seek
6 treatment or follow a prescribed course of treatment may be considered when
7 evaluating the claimant's subjective symptoms. *Orn v. Astrue*, 495 F.3d 625, 638
8 (9th Cir. 2007). And evidence of a claimant's self-limitation and lack of
9 motivation to seek treatment are appropriate considerations in determining the
10 credibility of a claimant's subjective symptom reports. *Osenbrock v. Apfel*, 240
11 F.3d 1157, 1165-66 (9th Cir. 2001); *Bell-Shier v. Astrue*, 312 F. App'x 45, *3 (9th
12 Cir. 2009) (unpublished opinion) (considering why plaintiff was not seeking
13 treatment). When there is no evidence suggesting that the failure to seek or
14 participate in treatment is attributable to a mental impairment rather than a
15 personal preference, it is reasonable for the ALJ to conclude that the level or
16 frequency of treatment is inconsistent with the alleged severity of complaints.
17 *Molina*, 674 F.3d at 1113-14. But when the evidence suggests lack of mental
18 health treatment is partly due to a claimant's mental health condition, it may be
19 inappropriate to consider a claimant's lack of mental health treatment when
20

1 evaluating the claimant's failure to participate in treatment. *Nguyen v. Chater*, 100
2 F.3d 1462, 1465 (9th Cir. 1996).

3 The ALJ noted that despite her allegations of disabling psychological
4 symptoms, Plaintiff went years after her alleged onset date without mental health
5 treatment. Tr. 708. Plaintiff declined mental health counseling in October 2015
6 and did not return to counseling until July 2017, when DSHS mandated she attend
7 treatment. Tr. 710, 1211. Plaintiff also alleges significant physical limitations but
8 did not have any documented treatment for her physical symptoms for three years
9 after her alleged onset date. Tr. 708. However, the ALJ failed to consider the
10 reasons Plaintiff did not seek treatment. Plaintiff did not have medical insurance
11 until she began seeking treatment in 2014. Tr. 338. Multiple providers also
12 documented Plaintiff's agoraphobia and difficulty leaving her house, using public
13 transit, and attending appointments, due to her mental health impairments. *See*,
14 *e.g.*, Tr. 920-21, 935, 944. The ALJ noted Plaintiff only went to treatment because
15 it was mandatory, Tr. 710-11, but failed to consider Plaintiff's anxiety regarding
16 treatment and difficulty engaging in treatment, Tr. 456-57, 547, 551-52, 557-58,
17 560. The ALJ erred in finding Plaintiff's symptom claims were inconsistent with
18 her lack of treatment, without considering the reasons Plaintiff did not seek
19 treatment.

20 2. *Drug-Seeking*

1 The ALJ found Plaintiff engaged in drug-seeking behavior that undermines
2 the reliability of her pain reporting. Tr. 708. Drug seeking behavior can be a clear
3 and convincing reason to discount a claimant's credibility. See *Edlund*, 253 F.3d
4 at 1157 (holding that evidence of drug seeking behavior undermines a claimant's
5 credibility); *Gray v. Comm'r, of Soc. Sec.*, 365 F. App'x 60, 63 (9th Cir. 2010)
6 (evidence of drug-seeking behavior is a valid reason for finding a claimant not
7 credible); *Lewis v. Astrue*, 238 F. App'x 300, 302 (9th Cir. 2007) (inconsistency
8 with the medical evidence and drug-seeking behavior sufficient to discount
9 credibility); *Morton v. Astrue*, 232 F. App'x 718, 719 (9th Cir. 2007) (drug-seeking
10 behavior is a valid reason for questioning a claimant's credibility).

11 While the ALJ found Plaintiff engaged in drug-seeking behavior, the ALJ
12 does not cite to any evidence of drug-seeking. Tr. 708. The ALJ noted Plaintiff
13 continued to use marijuana and pain medication during the relevant period and
14 noted three occasions when Plaintiff tested negative for her prescribed opiates. Tr.
15 708-10. However, the medical records note there were times her in-house testing
16 was negative, but the Labcorp testing then confirmed the presence of the
17 medication, and stated Plaintiff would be continued on her medications pending
18 confirmatory testing. Tr. 1055, 1070. The Labcorp confirmation testing from two
19 of the cited time periods demonstrates Plaintiff was taking pain medication,
20 consistent with her prescribed medication. Tr. 1056, 1073-74. Defendant does not

1 set forth any defense of this finding. *See* ECF No. 14. It is unclear whether this is
2 an admission by Defendant that the ALJ erred or whether it was an oversight. As
3 the ALJ failed to cite to any evidence to support the conclusion, the ALJ’s finding
4 that Plaintiff engaged in drug-seeking behavior is not supported by substantial
5 evidence. Defendant has waived any argument on the issue. *See Wilcox v.*
6 *Commisioner*, 848 F.2d 1007, 1008 n.2 (9th Cir. 1998) (“[a]rguments not
7 addressed in a brief are deemed abandoned”); *see also Justice v. Rockwell Collins.*
8 *Inc.*, 117 F.Supp.3d 1119, 1134 (D. Or. 2015), *aff’d*, 720 F. App’x 365 (9th Cir.
9 2017) (“if a party fails to counter an argument that the opposing party makes ... the
10 court may treat that argument as conceded”) (citation and internal quotations and
11 brackets omitted); *Kinley v. Astrue*, No. 1:12-cv-740-JMS-DKL, 2013 WL 494122,
12 *3 (S.D. Ind. Feb. 8, 2013) (“The Commissioner does not respond to this [aspect of
13 claimant’s] argument, and it is unclear whether this is a tacit admission by the
14 Commissioner that the ALJ erred or whether it was an oversight. Either way, the
15 Commissioner has waived any response.”).

16 3. *Activities of Daily Living*

17 The ALJ found Plaintiff’s symptom claims were inconsistent with her ability
18 to provide care for her children. Tr. 709-11. The ability to care for others without
19 help has been considered an activity that may undermine claims of totally disabling
20 pain. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). However, if the

1 care activities are to serve as a basis for the ALJ to discredit the Plaintiff's
2 symptom claims, the record must identify the nature, scope, and duration of the
3 care involved and this care must be "hands on" rather than a "one-off" care
4 activity. *Trevizo v. Berryhill*, 871 F.3d 664, 675-76 (9th Cir. 2017).

5 The ALJ found Plaintiff provided childcare, without assistance, for her three
6 children. Tr. 709-11. The ALJ noted Plaintiff was able to carry an infant in an
7 infant seat, and "doing lots of lifting and activities" while providing childcare. Tr.
8 1108, 1124. Plaintiff reported some difficulties, such as no longer being able to lift
9 her child after they gained weight, and testified she takes breaks between tasks in
10 the home. Tr. 754-57. The ALJ also cited to Plaintiff's ability to do activities
11 outside of her home, including moving, but there is no discussion of Plaintiff's role
12 in the move, and while the note states medication allows her to get outside with her
13 kids, there is no further information about Plaintiff's activities. Tr. 1063. The ALJ
14 does not set forth an analysis as to how Plaintiff's ability to provide care for her
15 children in her home is inconsistent with her allegations of disabling mental health
16 limitations outside of her home, and the minimal activities cited to by the ALJ do
17 not amount to substantial evidence. The ALJ erred in finding Plaintiff's ability to
18 care for her children was inconsistent with her symptom claims.

19
20 *4. Inconsistent Objective Medical Evidence*

1 The ALJ found the objective medical evidence was inconsistent with
2 Plaintiff's symptom claims. Tr. 708-11. An ALJ may not discredit a claimant's
3 symptom testimony and deny benefits solely because the degree of the symptoms
4 alleged is not supported by objective medical evidence. *Rollins*, 261 F.3d at 857;
5 *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d
6 597, 601 (9th Cir. 1989); *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005).
7 However, the objective medical evidence is a relevant factor, along with the
8 medical source's information about the claimant's pain or other symptoms, in
9 determining the severity of a claimant's symptoms and their disabling effects.
10 *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2).

11 The ALJ found the objective medical evidence related to Plaintiff's physical
12 and mental impairments, including evidence of improvement with treatment, is
13 inconsistent with Plaintiff's symptom claims. Tr. 708-11. However, the Court
14 finds the ALJ's other reasons for rejecting Plaintiff's symptom claims are not
15 supported by substantial evidence. As this reason alone is not a sufficient reason to
16 reject Plaintiff's claims, the ALJ erred in finding Plaintiff's symptom claims were
17 inconsistent with the objective medical evidence. On remand, the ALJ is
18 instructed to reconsider Plaintiff's symptom claims and give clear and convincing
19 reasons, supported by substantial evidence, to reject Plaintiff's claims.

20 **B. Step Three**

1 Plaintiff contends the ALJ erred by failing to find her impairments meet or
2 equal Listing 1.04A. ECF No. 13 at 3-5. At step three, the ALJ must determine if
3 a claimant's impairments meet or equal a listed impairment. 20 C.F.R. §§
4 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

5 The Listing of Impairments "describes for each of the major body systems
6 impairments [which are considered] severe enough to prevent an individual from
7 doing any gainful activity, regardless of his or her age, education or work
8 experience." 20 C.F.R. §§ 404.1525, 416.925. "Listed impairments are
9 purposefully set at a high level of severity because 'the listings were designed to
10 operate as a presumption of disability that makes further inquiry unnecessary.'"
11 *Kennedy v. Colvin*, 738 F.3d 1172, 1176 (9th Cir. 2013) (citing *Sullivan v. Zebley*,
12 493 U.S. 521, 532 (1990)). "Listed impairments set such strict standards because
13 they automatically end the five-step inquiry, before residual functional capacity is
14 even considered." *Kennedy*, 738 F.3d at 1176. If a claimant meets the listed
15 criteria for disability, she will be found to be disabled. 20 C.F.R. §§
16 404.1520(a)(4)(iii), 416.920(a)(4)(iii).

17 "To *meet* a listed impairment, a claimant must establish that he or she meets
18 each characteristic of a listed impairment relevant to his or her claim." *Tackett*,
19 180 F.3d at 1099 (emphasis in original); 20 C.F.R. §§ 404.1525(d), 416.925(d).
20 "To *equal* a listed impairment, a claimant must establish symptoms, signs and

1 laboratory findings ‘at least equal in severity and duration’ to the characteristics of
2 a relevant listed impairment” *Tackett*, 180 F.3d at 1099 (emphasis in original)
3 (quoting 20 C.F.R. § 404.1526(a)). “If a claimant suffers from multiple
4 impairments and none of them individually meets or equals a listed impairment,
5 the collective symptoms, signs and laboratory findings of all of the claimant’s
6 impairments will be evaluated to determine whether they meet or equal the
7 characteristics of any relevant listed impairment.” *Id.* However, “[m]edical
8 equivalence must be based on medical findings,” and “[a] generalized assertion of
9 functional problems is not enough to establish disability at step three.” *Id.* at 1100
10 (quoting 20 C.F.R. § 404.1526(a)).

11 The claimant bears the burden of establishing her impairment (or
12 combination of impairments) meets or equals the criteria of a listed impairment.
13 *Burch*, 400 F.3d at 683. “An adjudicator’s articulation of the reason(s) why the
14 individual is or is not disabled at a later step in the sequential evaluation process
15 will provide rationale that is sufficient for a subsequent reviewer or court to
16 determine the basis for the finding about medical equivalence at step 3.” Social
17 Security Ruling (SSR) 17-2P, 2017 WL 3928306, at *4 (effective March 27,
18 2017).

19 Here, the ALJ found that Plaintiff’s impairments and combinations of
20 impairments did not meet or equal any listings, including Listing 1.04A. Tr. 704-

05. To meet Listing § 1.04A, a claimant must establish: (1) evidence of nerve root compression characterized by neuro-anatomic distribution of pain; (2) limitations of motion of the spine; (3) motor loss (“atrophy with associated muscle weakness or muscle weakness”) accompanied by sensory or reflex loss, and (4) if there is involvement of the lower back, positive straight-leg raising test (sitting and supine). *Gnibus v. Berryhill*, 2017 WL 977594, at *4 (E. D. Cal. March 13, 2017) (finding Listing 1.04A was met) (citing *Sullivan*, 493 U.S. at 530 (“For a claimant to show that his impairment matches a listing, it must meet *all* of the specified medical criteria. An impairment that manifests only some of those criteria, no matter how severely, does not qualify.”)). Further, Plaintiff must establish the impairment satisfies the 12-month durational requirement. *Id.* at *7 (internal citations omitted); *see also Stewart v. Colvin*, 674 F.App’x 634, 635 (9th Cir. 2017) (Plaintiff failed to carry his burden of establishing that he met all of the criteria for Listing 1.04A).

A cervical MRI demonstrated Plaintiff had cervical radiculopathy, stenosis, and nerve root encroachment at C6 in January 2015. Tr. 704 (citing Tr. 493-94, 498, 504). However, Plaintiff had normal range of motion, strength, and sensation at many appointments. Tr. 704-05 (citing Tr. 467-68, 520-22, 564, 1075-76, 1083, 1085, 1093, 1099, 1103-18, 1124). Plaintiff points to a single incident when she had limited range of motion, ECF No. 13 at 4 (citing Tr. 339), and a single

1 appointment where atrophy was documented, ECF No. 13 at 4 (citing Tr. 350), as
2 well as visits where Plaintiff had decreased strength and numbness, ECF No. 13 at
3 4-5 (citing Tr. 326, 339, 345, 347, 350, 478, 496, 501, 970, 982-83). However,
4 there are many visits where Plaintiff had no atrophy, no numbness, normal
5 strength, and normal range of motion. Tr. 346, 350, 355, 359, 429, 497-98, 501,
6 982.

7 While Plaintiff argues the ALJ largely cited to irrelevant evidence, the ALJ
8 cited to the objective evidence discussed *supra* to support the conclusion Plaintiff's
9 spinal impairment does not cause the motor or sensory loss required for Listing
10 1.04A. Tr. 705. Additionally, the ALJ noted Plaintiff was able to provide
11 childcare for two young children with no help, which included lifting and carrying
12 an infant, and she reported she controlled her pain fairly well with medication. Tr.
13 704-05 (citing Tr. 1063, 1124). While Plaintiff's activities alone do not clearly
14 demonstrate Plaintiff is not disabled, the ALJ reasonably found that the objective
15 evidence, along with Plaintiff's reported ability to control her symptoms with
16 medication and engage in such activities, are inconsistent with an impairment that
17 is of Listing-level severity. Plaintiff has not met her burden in demonstrating she
18 meets or equals Listing 1.04A. Plaintiff is not entitled to remand on these grounds.

C. Medical Opinion Evidence

Plaintiff contends the ALJ erred in his consideration of the opinions of Philip Barnard, Ph.D.; Shirley Goodman, LMHC; Cara Kline, M.Ed.; Sasha Baker, MSW; Kristylynne Goveia, LCSW; Karl Scott Reinmuth, M.D.; and Kari Hoover, PA-C. ECF No. 13 at 5-16.

There are three types of physicians: “(1) those who treat the claimant (treating physicians); (2) those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine nor treat the claimant [but who review the claimant’s file] (nonexamining [or reviewing] physicians).” *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted). Generally, a treating physician’s opinion carries more weight than an examining physician’s, and an examining physician’s opinion carries more weight than a reviewing physician’s. *Id.* at 1202. “In addition, the regulations give more weight to opinions that are explained than to those that are not, and to the opinions of specialists concerning matters relating to their specialty over that of nonspecialists.” *Id.* (citations omitted).

If a treating or examining physician’s opinion is uncontradicted, the ALJ may reject it only by offering “clear and convincing reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). “However, the ALJ need not accept the opinion of any physician, including a

1 treating physician, if that opinion is brief, conclusory and inadequately supported
2 by clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
3 (9th Cir. 2009) (internal quotation marks and brackets omitted). “If a treating or
4 examining doctor’s opinion is contradicted by another doctor’s opinion, an ALJ
5 may only reject it by providing specific and legitimate reasons that are supported
6 by substantial evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-
7 31). The opinion of a nonexamining physician may serve as substantial evidence if
8 it is supported by other independent evidence in the record. *Andrews v. Shalala*,
9 53 F.3d 1035, 1041 (9th Cir. 1995).

10 “Only physicians and certain other qualified specialists are considered
11 ‘[a]cceptable medical sources.’” *Ghanim*, 763 F.3d at 1161 (alteration in original);
12 *see* 20 C.F.R. §§ 404.1513, 416.913 (2013).² However, an ALJ is required to
13 consider evidence from non-acceptable medical sources, such as therapists. 20
14 C.F.R. §§ 404.1513(d), 416.913(d) (2013).³ An ALJ may reject the opinion of a
15

16 ² The regulation that defines acceptable medical sources is found at 20 C.F.R. §§
17 404.1502, 416.902 for claims filed after March 27, 2017. The Court applies the
18 regulation in effect at the time the claim was filed.

19 ³ The regulation that requires an ALJ’s consider opinions from non-acceptable
20 medical sources is found at 20 C.F.R. §§ 404.1502c, 416.920c for claims filed after

1 non-acceptable medical source by giving reasons germane to the opinion. *Ghanim*,
2 763 F.3d at 1161.

3 *1. Dr. Reinmuth*

4 On July 17, 2017, Dr. Reinmuth, a treating provider, rendered an opinion on
5 Plaintiff's functioning. Tr. 939-41. Dr. Reinmuth diagnosed Plaintiff with anxious
6 depression, degenerative disc disease of the cervical spine, chronic headaches, and
7 pregnancy. Tr. 939. Dr. Reinmuth opined Plaintiff was limited to sedentary work,
8 she could not lift more than 10 pounds, she could not sit or stand in the same
9 position for more than 30 minutes at a time, and she could not engage in any
10 significant bending or stooping. Tr. 939-40. He checked the box indicating the
11 limitations were permanent, but also wrote the conditions were likely to limit
12 Plaintiff for three months, and did not give an opinion on the number of hours per
13 week Plaintiff could engage in work activity. Tr. 940.

14 On June 22, 2018, Dr. Reinmuth, rendered another opinion on Plaintiff's
15 functioning. Tr. 930-32. Dr. Reinmuth diagnosed Plaintiff with chronic neck,
16 bilateral shoulder, and arm pain due to degenerative discs and arthritis in her
17 cervical spine, and chronic low back pain with sciatica in the left greater than right

18 _____
19 March 27, 2017. The Court applies the regulation in effect at the time the claim
20 was filed.

1 legs. Tr. 930. Dr. Reinmuth opined Plaintiff is limited to light work and is unable
2 to lift/pull/push more than 20 pounds, she can only occasionally reach, stoop, and
3 bend, and she cannot sit or stand in the same position for more than 30 minutes at a
4 time, but Plaintiff is able to engage in work activities 31 to 40 hours per week. Tr.
5 930-31. Dr. Reinmuth opined the limitations were likely permanent. Tr. 931. The
6 ALJ gave minimal weight to Dr. Reinmuth's opinions. Tr. 712. As Dr.
7 Reinmuth's opinions were contradicted by the opinions of Matthew Comrie,
8 Psy.D, Tr. 62-69, Jane Lewis, Ph.D., Tr. 91-98, and Diane Rubin, M.D., Tr. 95-97,
9 the ALJ was required to give specific and legitimate reasons to reject Dr.
10 Reinmuth's opinions. *See Bayliss*, 427 F.3d at 1216. Plaintiff only challenges the
11 ALJ's rejection of the June 2018 opinion. ECF No. 13 at 7-9.

12 First, the ALJ found Dr. Reinmuth relied on Plaintiff's unreliable self-report.
13 Tr. 712. A physician's opinion may also be rejected if it is too heavily based on a
14 claimant's properly discounted complaints. *Tonapetyan v. Halter*, 242 F.3d 1144,
15 1149 (9th Cir. 2001). The ALJ found Dr. Reinmuth's opinion lacked an objective
16 basis and thus the opinion must be based on Plaintiff's unreliable self-reported pain
17 and limitations. Tr. 712. However, for the reasons discussed *supra*, the ALJ erred
18 in his analysis of Plaintiff's symptom claims. As such, the ALJ erred in rejecting
19 Dr. Reinmuth's opinion as too reliant on Plaintiff's self-report.
20

1 While the ALJ offered other reasons to reject Dr. Reinmuth's opinion, as the
2 case is being reminded to reconsider Plaintiff's symptom claims, the ALJ is also
3 instructed to reconsider Dr. Reinmuth's opinion. For the purposes of the remand,
4 the Court notes that while the ALJ rejected Dr. Reinmuth's opinion in part because
5 Plaintiff's pain was controlled with the use of controlled substances "for which she
6 repeatedly tested negative," Tr. 711, multiple negative tests were later confirmed
7 as positive, as discussed *supra*.

8 2. *Ms. Goodman*

9 On August 27, 2014, Ms. Goodman, a treating counselor, rendered an
10 opinion on Plaintiff's functioning. Tr. 949-51. Ms. Goodman opined Plaintiff may
11 need some assistance to participate in life skills, she could engage in work
12 activities 11 to 20 hours per week, she can lift up to five pounds, and can "stand or
13 walk," but Ms. Goodman checked the box indicating Plaintiff is severely limited,
14 meaning she cannot lift at least two pounds or is unable to stand or walk, and the
15 limitations were expected to last three months. Tr. 949-50. The ALJ gave Ms.
16 Goodman's opinion minimal weight. Tr. 712. As Ms. Goodman is not an
17 acceptable medical source, the ALJ was required to give germane reasons to reject
18 Ms. Goodman's opinion. *See Ghanim*, 763 F.3d at 1161

19 First, the ALJ found Ms. Goodman relied on Plaintiff's unreliable self-
20 report. Tr. 712. A physician's opinion may also be rejected if it is too heavily

1 based on a claimant's properly discounted complaints. *Tonapetyan*, 242 F.3d at
2 1149. The ALJ found Ms. Goodman's opinion lacked an objective basis and thus
3 the opinion must be based on Plaintiff's unreliable self-reported pain and
4 limitations. Tr. 712. However, for the reasons discussed *supra*, the ALJ erred in
5 his analysis of Plaintiff's symptom claims. As such, the ALJ erred in rejecting Ms.
6 Goodman's opinion as too reliant on Plaintiff's self-report.

7 While the ALJ offered other reasons to reject Ms. Goodman's opinion, as
8 the case is being remanded to reconsider Plaintiff's symptom claims, the ALJ is
9 also instructed to reconsider Ms. Goodman's opinion. For the purposes of the
10 remand, the Court notes that while the ALJ also rejected Ms. Goodman's opinion
11 in part because Plaintiff's pain was controlled with the use of controlled substances
12 "for which she repeatedly tested negative," Tr. 711, multiple negative tests were
13 later confirmed as positive, as discussed *supra*.

14 3. Dr. Barnard

15 On June 19, 2014, Dr. Barnard, an examining source, rendered an opinion on
16 Plaintiff's functioning. Tr. 393-97. Dr. Barnard diagnosed Plaintiff with
17 agoraphobia and generalized anxiety disorder. Tr. 394. Dr. Barnard opined
18 Plaintiff's panic attacks would interfere with her ability to work on a daily basis to
19 a marked extent; she has moderate limitations in her ability to understand,
20 remember, and persist in tasks by following very short and simple instructions,

1 learn new tasks, make simple work-related decisions, be aware of normal hazards
2 and take appropriate precautions, ask simple questions or request assistance, and
3 set realistic goals and plan independently; marked limitations in her ability to
4 understand, remember, and persist in tasks by following detailed instructions,
5 perform activities within a schedule, maintain regular attendance, and be punctual
6 within customary tolerances without special supervision, and perform routine tasks
7 without special supervision; and severe limitations in her ability to adapt to
8 changes in a routine work setting, communicate and perform effectively in a work
9 setting, complete a normal workday/workweek without interruptions from
10 psychologically based symptoms, and set realistic goals and plan independently.

11 Tr. 394-95. He opined the limitations would last 24 to 48 months and were not
12 primarily due to substance use. Tr. 395. The ALJ gave minimal weight to Dr.
13 Barnard's opinion. Tr. 712. As Dr. Barnard's opinion was contradicted by the
14 opinions of Matthew Comrie, Psy.D, Tr. 62-69, and Jane Lewis, Ph.D., Tr. 91-98,
15 the ALJ was required to give specific and legitimate reasons to reject Dr. Barnard's
16 opinion. *See Bayliss*, 427 F.3d at 1216.

17 As the case is being remanded for the ALJ to reconsider Plaintiff's symptom
18 claims and other medical opinions, the ALJ is also instructed to reconsider Dr.
19 Barnard's opinion. For the purposes of the remand, the Court notes that while the
20 ALJ found Dr. Barnard's opinion was inconsistent with Plaintiff's ability to

1 provide care for her children, Tr. 712, the ALJ does not set forth an analysis as to
2 how her ability to provide in-home care for her children is inconsistent with Dr.
3 Barnard's opinion. ECF No. 13 at 10-11. The ALJ also found Dr. Barnard did not
4 notice "the effects of her substance use disorder(s)," Tr. 712-13, however Dr.
5 Barnard documented Plaintiff's marijuana use, Tr. 393, and the ALJ does not set
6 forth an analysis as to how Plaintiff's substance use impacts Plaintiff's functioning
7 in a way that Dr. Barnard did not account for.

8 *4. Ms. Goveia*

9 On November 14, 2014, Ms. Goveia,⁴ a treating counselor, rendered an
10 opinion on Plaintiff's functioning. Tr. 952-54. Ms. Goveia stated Plaintiff was
11 diagnosed with PTSD, high anxiety, and depression. Tr. 952. She opined Plaintiff
12 is unable to interact with people and is not able to leave her home, she struggles
13 with making and keeping appointments, has a hard time participating in interviews
14 and advocating for herself, and is unable to participate in work activities. Tr. 952-
15 53. She opined Plaintiff's limitations were expected to last six months. Tr. 953.
16 The ALJ gave Ms. Goveia's opinion minimal weight. Tr. 713. As Ms. Goveia is
17 not an acceptable medical source, the ALJ was required to give germane reasons to
18 reject Ms. Goveia's opinion. *See Ghanim*, 763 F.3d at 1161

19
20 ⁴ The ALJ refers to Ms. Goveia as Ms. Govera. Tr. 713.

1 As the case is being remanded for the ALJ to reconsider Plaintiff's symptom
2 claims and other medical opinions, the ALJ is also instructed to reconsider Ms.
3 Goveia's opinion. For the purposes of the remand, the Court notes that the ALJ
4 rejected Ms. Goveia, Ms. Kline, and Ms. Baker's opinion in part due to Plaintiff's
5 ability to care for her children, Tr. 713, but the ALJ did not set forth an analysis as
6 to how Plaintiff's ability to provide in-home care for her children is inconsistent
7 with the opinions. The ALJ also again erred in rejecting the opinions as
8 inconsistent with Plaintiff's symptom claims, Tr. 713, as the ALJ did not give clear
9 and convincing reasons to reject Plaintiff's claims as discussed *supra*. Given the
10 ALJ's repeated references to providers not accounting for the impact of Plaintiff's
11 substance use, Tr. 713, when the ALJ did not set forth an analysis of the effects of
12 Plaintiff's substance use, the ALJ is instructed to consider whether calling a
13 psychological expert is necessary at the hearing to assist with determining the
14 impact of Plaintiff's substance use on her functioning.

15 *5. Ms. Kline*

16 On July 24, 2017, Ms. Kline, a treating counselor, rendered an opinion on
17 Plaintiff's functioning. Tr. 944-46. Ms. Kline stated Plaintiff had been diagnosed
18 with major depressive disorder, and moderate cannabis use disorder. Tr. 944. She
19 opined Plaintiff's depression and anxiety limit her ability to concentrate, stay on
20 task, leave the house, attend appointments, and her overall functionality, and

1 Plaintiff is limited to engaging in work activities one to 10 hours per week,
2 although she is “unable to assess fully.” Tr. 944. She stated she is unable to assess
3 whether Plaintiff’s conditions are permanent. Tr. 945.

4 On July 2, 2018, Ms. Kline, rendered another opinion on Plaintiff’s
5 functioning. Tr. 934-36. Ms. Kline stated Plaintiff had been diagnosed with major
6 depressive disorder, recurrent episode, severe. Tr. 934. She opined Plaintiff has
7 difficulty concentrating, interacting with others, following directions, and
8 maintaining a schedule, she is unable to utilize public transportation, and she is
9 able to engage in work activities one to 10 hours per month. Tr. 934-35. She
10 opined the limitations were expected to last six months. Tr. 935. The ALJ gave
11 Ms. Kline’s opinions minimal weight. Tr. 713. As Ms. Kline is not an acceptable
12 medical source, the ALJ was required to give germane reasons to reject Ms.
13 Kline’s opinions. *See Ghanim*, 763 F.3d at 1161

14 As the case is being remanded for the ALJ to reconsider Plaintiff’s symptom
15 claims and other medical opinions, the ALJ is also instructed to reconsider Ms.
16 Kline’s opinions.

17 *6. Ms. Baker*

18 On January 2, 2019, Ms. Baker, a treating counselor, rendered an opinion on
19 Plaintiff’s functioning. Tr. 926-28. Ms. Baker stated Plaintiff had been diagnosed
20 with major depressive disorder, recurrent, severe. Tr. 926. She opined Plaintiff

1 struggles with regulating her emotions, concentration, following directions, and
2 completing tasks, and she is unable to participate in work activities. *Id.* She
3 opined Plaintiff's limitations were expected to last 12 months. Tr. 827. The ALJ
4 gave Ms. Baker's opinion minimal weight. Tr. 713. As Ms. Baker is not an
5 acceptable medical source, the ALJ was required to give germane reasons to reject
6 Ms. Baker's opinion. *See Ghanim*, 763 F.3d at 1161.

7 As the case is being remanded for the ALJ to reconsider Plaintiff's symptom
8 claims and other medical opinions, the ALJ is also instructed to reconsider Ms.
9 Baker's opinion.

10 **D. Remedy**

11 Plaintiff urges this Court to remand for an immediate award of benefits.
12 ECF No. 13 at 5, ECF No. 15 at 9-11.

13 "The decision whether to remand a case for additional evidence, or simply to
14 award benefits is within the discretion of the court." *Sprague v. Bowen*, 812 F.2d
15 1226, 1232 (9th Cir. 1987) (citing *Stone v. Heckler*, 761 F.2d 530 (9th Cir. 1985)).
16 When the Court reverses an ALJ's decision for error, the Court "ordinarily must
17 remand to the agency for further proceedings." *Leon v. Berryhill*, 880 F.3d 1041,
18 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) ("the
19 proper course, except in rare circumstances, is to remand to the agency for
20 additional investigation or explanation"); *Treichler v. Comm'r of Soc. Sec. Admin.*,

1 775 F.3d 1090, 1099 (9th Cir. 2014). However, in a number of Social Security
2 cases, the Ninth Circuit has “stated or implied that it would be an abuse of
3 discretion for a district court not to remand for an award of benefits” when three
4 conditions are met. *Garrison*, 759 F.3d at 1020 (citations omitted). Under the
5 credit-as-true rule, where (1) the record has been fully developed and further
6 administrative proceedings would serve no useful purpose; (2) the ALJ has failed
7 to provide legally sufficient reasons for rejecting evidence, whether claimant
8 testimony or medical opinion; and (3) if the improperly discredited evidence were
9 credited as true, the ALJ would be required to find the claimant disabled on
10 remand, the Court will remand for an award of benefits. *Revels v. Berryhill*, 874
11 F.3d 648, 668 (9th Cir. 2017). Even where the three prongs have been satisfied,
12 the Court will not remand for immediate payment of benefits if “the record as a
13 whole creates serious doubt that a claimant is, in fact, disabled.” *Garrison*, 759
14 F.3d at 1021.

15 Plaintiff urges this Court for remand for immediate benefits as Plaintiff
16 argues she meets a Listing. ECF No. 13 at 5, ECF No. 15 at 2-3, 9-11. However,
17 Plaintiff has not met her burden in demonstrating she meets or equals a Listing, as
18 discussed *supra*. Further, even if the Court credited the disabling medical opinions
19 as true, Plaintiff concedes that her date last insured was in December 2013, and
20 there are no disabling opinions until 2014. ECF No. 15 at 10. The State agency

1 psychological consultants opined there was insufficient evidence to assess
2 Plaintiff's functioning at her date last insured. Tr. 57, 79. As such, there are no
3 medical opinions in file that establish Plaintiff's functioning at her date last
4 insured, and there is minimal medical evidence prior to Plaintiff's date last insured.
5 The Court finds additional proceedings are necessary to further develop the record.
6 Additionally, there are conflicting medical opinions requiring resolution, including
7 the non-disabling opinions of the State agency medical consultants, and the
8 conflicting opinions from Plaintiff's providers, such as Dr. Reinmuth's two
9 different opinions on Plaintiff's physical limitations. On remand, the ALJ is
10 instructed to consider whether calling a medical and/or psychological expert is
11 necessary to determine Plaintiff's functioning at her date last insured, given the
12 lack of opinion evidence regarding her functioning at that time. The case is
13 remanded for further proceedings consistent with this Order.

14 **CONCLUSION**

15 Having reviewed the record and the ALJ's findings, the Court concludes the
16 ALJ's decision is not supported by substantial evidence and is not free of harmful
17 legal error. Accordingly, **IT IS HEREBY ORDERED:**

18 1. The District Court Executive is directed to substitute Kilolo Kijakazi as
19 Defendant and update the docket sheet.

20 2. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **GRANTED**.

1 3. Defendant's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.

2 4. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff
3 REVERSING and REMANDING the matter to the Commissioner of Social
4 Security for further proceedings consistent with this recommendation pursuant to
5 sentence four of 42 U.S.C. § 405(g).

6 The District Court Executive is directed to file this Order, provide copies to
7 counsel, and **CLOSE THE FILE**.

8 DATED February 3, 2022.

9 s/Mary K. Dimke
10 MARY K. DIMKE
11 UNITED STATES DISTRICT JUDGE
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